

Waterfalls Italian Cuisine, Inc. v Tamarin

2013 NY Slip Op 33299(U)

March 22, 2013

Sup Ct, Richmond County

Docket Number: 103199/2012

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND

WATERFALLS ITALIAN CUISINE, INC. and
 DENNIS ZOLLO SR.,

Plaintiff(s),

-against-

ROBERT P. TAMARIN, ESQ., LLOYD B.
 TAMARIN, GRACE GOLAD, STEVEN LASHER,
 and THE VENETIAN CIRCLE LLC,

Defendant(s).

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 103199/2012

Motion Nos.: 3547-001
 3606-002
 195-003

The following papers numbered 1 through and 4 were fully submitted on the 24th day of January, 2013.

	Papers Numbered
Plaintiffs' Order to Show Cause, dated December 4, 2012, with Exhibits and Supporting Papers _____	1
Defendant THE VENETIAN CIRCLE LLC's Notice of Cross-Motion, dated December 11, 2012, with Exhibits and Supporting Papers _____	2
Defendants LLOYD B. TAMARIN's, GRACE GOLAD's, and STEVEN LASHER's Notice of Cross-Motion, dated January 9, 2013, with Exhibits and Supporting Papers _____	3
Plaintiff DENNIS ZOLLO SR.'s Affidavit in Additional Support of Plaintiff's Order to Show Cause and Opposition to Motion to Dismiss, dated December 17, 2012 _____	4
Plaintiff's Affidavit of Stuart A. Jackson, Esq. In Opposition to Motion to Dismiss, dated January 21, 2013 _____	5
Plaintiffs' Memorandum of Law, dated December 18, 2012 _____	6
Plaintiffs' Affidavit in Additional Support, dated December 18, 2012 _____	7

Defendant THE VENETIAN CIRCLE LLC's Reply, dated December 19,
2011[sic]] _____ 8

Plaintiffs WATERFALLS ITALIAN CUISINE, INC. ("WATERFALLS") and DENNIS ZOLLO Sr. move by Order to Show Cause to enjoin defendants from taking any action to terminate an alleged lease of premises located at 2014 Victory Boulevard, Staten Island, New York. Defendants THE VENETIAN CIRCLE LLC (hereinafter "VENETIAN"), LLOYD B. TAMARIN, GRACE GOLAD and STEVEN LASHER cross-move, pursuant to CPLR 3211(a)(1), to dismiss plaintiffs' Complaint. Defendant ROBERT P. TAMARIN has not appeared in the action.

In July, 2002, WATERFALLS entered into a 10 year lease agreement of the subject premises with "ROBERT P. TAMARIN, as managing partner of ROBERT P. TAMARIN, LLOYD B. TAMARIN, GRACE GOLAD and STEVEN LASHER" (hereinafter "Landlord"). The lease contains an option to renew which provides, as follows:

67th. OPTION: Provided Tenant is not then in default after applicable cure periods of the terms and agreement contained in this Lease, Tenant shall have the option to extend this Lease for three (3) additional periods of ten (10) years each. Upon such extension all terms and conditions shall remain as set forth in this Lease except the annual rent for each year of each renewal period shall be increased by five (5%) percent over the previous year's annual rent. Tenant shall notify Landlord in writing by certified mail, return receipt requested, no less than one hundred eighty (180) days prior to the expiration of the term of this lease and each renewal term thereafter of his intent to exercise this option and upon failure to do so this option shall be deemed waived. Time shall be of the essence as to this option.

Accordingly, as the base term of the lease expired on June 30, 2012, WATERFALLS was

required to notify the “Landlord in writing by certified mail, return receipt requested” by December 31, 2011 of its intention to exercise the option to renew. It is undisputed that WATERFALLS did not provide the Landlord with the requisite written notification. However, WATERFALLS contends that plaintiff DENNIS ZOLLO, Sr. (“ZOLLO”) had a discussion with defendant ROBERT P. TAMARIN wherein ZOLLO expressed his intention to exercise the option to renew and that defendant ROBERT P. TAMARIN “told [ZOLLO] not to worry, that he would take care of everything and that Waterfalls and [ZOLLO] could consider the option exercised and the lease extended for another ten years” (Affidavit in Additional Support of Plaintiff’s Order to Show Cause and Opposition to Motion to Dismiss [“ZOLLO Affidavit”], dated December 17, 2012, ¶2. WATERFALLS claims that it had the right to rely on the oral representation from defendant ROBERT P. TAMARIN because he had represented WATERFALLS in this transaction as well as in other matters. Despite this contention, WATERFALLS, on June 26, 2012, approximately 6 months after it was required to exercise the option, agreed, in writing, to reduce its rent which superceded all other agreements reached between the parties.

Prior to its purchase of the subject premises in October, 2012 and approximately 10 months after the option had expired, VENETIAN was told by defendant ROBERT P. TAMARIN that WATERFALLS had not exercised the option to renew and was a month-to-month tenant. Accordingly, VENETIAN contends that WATERFALLS did not properly exercise the option pursuant to the terms of the lease and, in any event, any alleged oral waiver claimed by WATERFALLS from defendant ROBERT P. TAMARIN is ineffective as the lease contains a

prohibition on any waiver unless it is reduced to writing signed by the waiving party.

The “proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, “the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” (*Chance v. Felder*, 33 AD3d 645, 645-646 [2006]).

VENETIAN has made a prima facie showing of its entitlement to a judgment dismissing all causes of action asserted by WATERFALLS. WATERFALLS has failed to produce any writing to confirm that an option to renew was exercised and its reliance on an alleged oral confirmation by defendant ROBERT TAMARIN is insufficient to burden VENETIAN with such a tenancy. In addition, WATERFALLS is unable to satisfy the statute of frauds requirement of New York General Obligations Law §5-703(2) which requires that a lease “for a longer period of one year . . . is void” unless it is reduced to a “writing”. WATERFALLS reliance on *J.N.A. Reality Corp. v. Cross Bay Chelsea, Inc.*, 42 NY2d 392 (1977) as an exception to the statute of frauds on equitable grounds is misplaced as VENETIAN, as a new purchaser/landlord, would be substantially “harmed” if the lease was determined to be effective.

Defendants LLOYD B. TAMARIN, GRACE GOLAD¹ and STEVEN LASHER

¹ Defendant GRACE GOLAD transferred her interest in the property to the Golad Family Trust in January, 2004 and she passed away on December 8, 2004. Defendants LLOYD TAMARIN, GRACE GOLAD and STEVEN LASHER have not asserted any jurisdictional defenses.

transferred their ownership interest in the subject premises to 2008 Victory Boulevard, LLC, by deed, dated April 15, 2011. These defendants also move to dismiss WATERFALLS complaint on the ground that WATERFALLS has failed to produce any written confirmation that the option was renewed. For the reasons set forth above, the motion to dismiss plaintiff's complaint by defendants LLOYD B. TAMARIN, GRACE GOLAD and STEVEN LASHER is granted as there is no evidence that these defendants had any knowledge of any attempt by WATERFALLS to exercise the option to renew.

In addition, WATERFALLS is also unable to obtain the requested relief from defendant ROBERT P. TAMARIN despite this defendant not having appeared or otherwise moved in this action. However, this determination does not prevent WATERFALLS from commencing a separate action to seek alternative forms of relief from defendant ROBERT P. TAMARIN.

Accordingly, it is

ORDERED, that the Order to Show Cause of WATERFALLS ITALIAN CUISINE, INC. and DENNIS ZOLLO Sr., to enjoin defendants from taking any action to terminate an alleged lease of premises located at 2014 Victory Boulevard, Staten Island, New York is denied in its entirety; and it is further

ORDERED, that defendant THE VENETIAN CIRCLE LLC's Motion, pursuant to CPLR 3211(a)(1), to dismiss plaintiffs' Complaint is granted; and it is further

ORDERED, that the Cross Motion of defendants LLOYD B. TAMARIN, GRACE GOLAD and STEVEN LASHER to dismiss plaintiffs' Complaint, pursuant to CPLR 3211(a)(1), is granted.

ORDERED that the Clerk enter judgment accordingly.

This shall constitute the decision and order of the Court.

E N T E R,

/s/ Philip G. Minardo
HON. PHILIP G. MINARDO

Dated: March 22, 2013